

Message

From: Dertke, Daniel (ENRD) [Daniel.Dertke@usdoj.gov]
Sent: 12/10/2014 6:14:35 PM
To: Smith, Ryan A. [RSmith@BHFS.com]
CC: Godfrey, Merrill C. [MGodfrey@AKINGUMP.com]; Paul Spruhan [pspruhan@nndoj.org]; Flynn, Aaron M. [flynna@hunton.com]; Pongrace, Don [dpongace@AKINGUMP.COM]; Wehrum, William L. [wwehrum@hunton.com]; Ramaley Karilee S [Karilee.Ramaley@srpnet.com]; Fichthorn, Norm [nfichthorn@hunton.com]; Hanuschak, Dulcinea Z. [DHanuschak@BHFS.com]; Anderson, Lea [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b8317edf62f74e67bcf42adbdf7785e9-LANDER03]; Lyons, Ann [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=39ea390c390e41fd84511d6cdc266cee-ALYONS]
Subject: Re: Motion to Consolidate-NGS

Thanks Ryan. NPCA has agreed to a briefing schedule with its opening brief due 2/20 and they understandably want to get something on file right away, given the current 12/22 deadline. EPA will stipulate to that, and I am pretty sure the Hopi will, too, for their case. I do not know where TNA stands on the schedule but as I previously mentioned, I think it would be wise for intervenors to make a proposal to petitioners.

On Dec 9, 2014, at 1:45 PM, Smith, Ryan A. <RSmith@BHFS.com> wrote:

Thanks. Motions in all four cases will be filed shortly. Hopi will not oppose.

Sent via the Samsung Galaxy Note® 3, an AT&T 4G LTE smartphone

----- Original message -----

From: "Dertke, Daniel (ENRD)" <Daniel.Dertke@usdoj.gov>
Date: 12/09/2014 1:39 PM (GMT-05:00)
To: "Smith, Ryan A." <RSmith@BHFS.com>, "Godfrey, Merrill C." <MGodfrey@AKINGUMP.com>, Paul Spruhan <pspruhan@nndoj.org>, "Flynn, Aaron M." <flynna@hunton.com>, "Pongrace, Don" <dpongace@AKINGUMP.COM>, "Wehrum, William L." <wwehrum@hunton.com>, Ramaley Karilee S <Karilee.Ramaley@srpnet.com>, "Fichthorn, Norm" <nfichthorn@hunton.com>
Cc: "Hanuschak, Dulcinea Z." <DHanuschak@BHFS.com>
Subject: RE: Motion to Consolidate-NGS

Thanks Ryan, this looks good to me.

From: Smith, Ryan A. [mailto:RSmith@BHFS.com]
Sent: Monday, December 08, 2014 4:36 PM
To: Dertke, Daniel (ENRD); Godfrey, Merrill C.; Paul Spruhan; 'Flynn, Aaron M.'; Pongrace, Don; Wehrum, William L.; Ramaley Karilee S; Fichthorn, Norm
Cc: Hanuschak, Dulcinea Z.
Subject: RE: Motion to Consolidate-NGS

All,

I have attached the most recent draft of the Joint Motion to Consolidate, which I believe incorporates all of your comments. Note, I have removed the jurisdiction discussion.

I spoke with Hopi's counsel this morning and she indicated that she did not think Hopi will oppose, but needed to confirm. She indicated that she would get back to me tonight. Therefore, either way, I will file the motion tomorrow.

Finally, I have made a representation regarding Mr. Yazzie's position. Please let me know if you think it adequately represents his position based on what you can ascertain from his e-mails.

Thanks,

Ryan

From: Dertke, Daniel (ENRD) [<mailto:Daniel.Dertke@usdoj.gov>]

Sent: Friday, December 05, 2014 5:54 PM

To: Godfrey, Merrill C.; Smith, Ryan A.; Paul Spruhan; 'Flynn, Aaron M.'; Pongrace, Don; Wehrum, William L.; Ramaley Karilee S; Fichthorn, Norm

Cc: Hanuschak, Dulcinea Z.

Subject: RE: Motion to Consolidate-NGS

I had the same thought as Merrill regarding jurisdiction – I don't see any lack of jurisdiction, either, but I'd hate to find out later that we have, for instance, some kind of argument regarding standing and have this concession on file. I was willing to go along with it, but on further reflection I'm with Merrill on just taking it out.

Regarding footnote 4, I thought about asking to move it to text since that is NPCA's only stated concern. So I agree with Merrill that it's a bit oblique. I'm ok saying that we are not seeking unified briefing as part of consolidation, but I would change the emphasis a bit and say that we are not proposing a unified briefing schedule and format at this time, because the parties are still discussing that, but the briefing format/schedule isn't relevant to consolidation. I just don't want to give the impression that we don't care about unified briefing or that we concede NPCA's objection to consolidating the actual briefs.

- Dan

From: Godfrey, Merrill C. [<mailto:MGodfrey@AKINGUMP.com>]

Sent: Friday, December 05, 2014 5:44 PM

To: Smith, Ryan A.; Dertke, Daniel (ENRD); Paul Spruhan; 'Flynn, Aaron M.'; Pongrace, Don; Wehrum, William L.; Ramaley Karilee S; Fichthorn, Norm

Cc: Hanuschak, Dulcinea Z.

Subject: RE: Motion to Consolidate-NGS

Thanks for doing this. I have two suggestions. One would be to avoid conceding jurisdiction. I'm not saying I see a serious basis for contesting jurisdiction at this point, but I don't think jurisdiction is a prima facie element of a motion to seek consolidation; it seems to me like lack of jurisdiction is rather a defense to consolidation. The Court can always deny consolidation for lack of jurisdiction if it sees a jurisdictional problem, as in the *Washington* case cited, but I think we only need to show that consolidation is in the interests of justice. I would cite a different case or none at all, to avoid confusion, and would delete the references to and concession of jurisdiction.

The other suggestion is to be more explicit that we do not seek a unified briefing schedule as part of consolidation. Footnote 4 alludes to this, but I think it may be too oblique to reassure the Court that it can grant the motion without requiring all the petitions to proceed in lockstep. Maybe a sentence along the lines of, "In light of [NRDC and anyone else]'s opposition to consolidated briefing, and in light of ongoing discussions among the parties regarding a proposed revised briefing schedule for these cases, this motion does not seek a unified briefing schedule for all four cases as part of consolidation."

Merrill Godfrey

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mgodfrey@akingump.com | akingump.com | [Bio](#)

From: Smith, Ryan A. [<mailto:RSmith@BHFS.com>]

Sent: Friday, December 05, 2014 4:34 PM

To: 'Dertke, Daniel (ENRD)'; Paul Spruhan; Godfrey, Merrill C.; 'Flynn, Aaron M.'; Pongrace, Don; Wehrum, William L.; Ramaley Karilee S; Fichthorn, Norm

Cc: Hanuschak, Dulcinea Z.

Subject: RE: Motion to Consolidate-NGS

Thanks Dan.

I have made your changes. I have also made changes recommend by Norm, including a few revisions relating to FRAP 3. Because we are dealing with Petitions seeking review of an agency action, FRAP 3 would not technically apply, although the rationale behind it still would. See FRAP, 20. Therefore, I have simply struck the citation to the Rule.

I would like to file this on Monday. Therefore, Paul and Merrill please let me know whether you have any revisions to the attached Motion.

Thanks and have a good weekend.

Ryan

From: Dertke, Daniel (ENRD) [<mailto:Daniel.Dertke@usdoj.gov>]

Sent: Friday, December 05, 2014 3:33 PM

To: Smith, Ryan A.; Paul Spruhan; 'mgodfrey@akingump.com'; 'Flynn, Aaron M.'; Don Pongrace; Wehrum, William L.; Ramaley Karilee S; Fichthorn, Norm

Subject: RE: Motion to Consolidate-NGS

Thanks Ryan. My only edit is very minor, that you should combine my signature block into one combined block for EPA and the Administrator, and that I'm in the Environmental Defense Section, not Enforcement.

I think we should go ahead and file as soon as all the moving parties sign off, and just note that the other petitioner groups were contacted on 12/3 and have not yet responded. It would be nice to file it unopposed, but better to get the clock ticking just in case.

From: Smith, Ryan A. [<mailto:RSmith@BHFS.com>]

Sent: Thursday, December 04, 2014 5:45 PM

To: Paul Spruhan; Dertke, Daniel (ENRD); 'mgodfrey@akingump.com'; 'Flynn, Aaron M.'; Don Pongrace;

Wehrum, William L.; Ramaley Karilee S; Fichthorn, Norm

Subject: RE: Motion to Consolidate-NGS

All,

Per our conversation, I have attached a draft Motion to Consolidate. I have not heard back from the Hopi or Black Mesa petitioners. Mr. Yazzie is understandably confused concerning the procedural posture of the case. Therefore, I will have to wait to complete the sections relating to the petitioners' position on consolidation.

That said, please let me know your thoughts and/or if you have any revisions. I tried to keep it relatively brief.

Thanks,

Ryan

From: Smith, Ryan A.

Sent: Tuesday, December 02, 2014 11:17 AM

To: Paul Spruhan; 'daniel.dertke@usdoj.gov'; 'mgodfrey@akingump.com'; 'Flynn, Aaron M.'; Don Pongrace; Wehrum, William L.; Ramaley Karilee S; Fichthorn, Norm

Subject: RE: Motion to Consolidate-NGS

Maybe I will just be silent on the briefing schedule and page limits then.

Sent via the Samsung Galaxy Note® 3, an AT&T 4G LTE smartphone

----- Original message -----

From: Paul Spruhan <pspruhan@nndoj.org>

Date: 12/02/2014 8:13 AM (GMT-08:00)

To: "Smith, Ryan A." <RSmith@BHFS.com>, "daniel.dertke@usdoj.gov" <Daniel.Dertke@usdoj.gov>, "mgodfrey@akingump.com" <MGodfrey@AKINGUMP.com>, "Flynn, Aaron M." <flynna@hunton.com>, Don Pongrace <dpongance@AKINGUMP.COM>, "Wehrum, William L." <wwehrum@hunton.com>, Ramaley Karilee S <Karilee.Ramaley@srpnet.com>, "Fichthorn, Norm" <nfichthorn@hunton.com>

Cc:

Subject: RE: Motion to Consolidate-NGS

Seems fine to me. As I recall the first order granting intervention structured the briefing as allowing each party and intervenor their own brief. The second order doesn't contradict that, but simply states the briefing is suspended. If that's the status quo, I don't see why we would agree at this point to anything else.

From: Smith, Ryan A. [<mailto:RSmith@BHFS.com>]

Sent: Tuesday, December 02, 2014 9:00 AM

To: 'daniel.dertke@usdoj.gov'; 'mgodfrey@akingump.com'; 'Flynn, Aaron M.'; Don Pongrace; Wehrum, William L.; Ramaley Karilee S; Paul Spruhan; Fichthorn, Norm

Subject: Re: Motion to Consolidate-NGS

I will reach out to the petitioners so I can make a representation to the Court concerning their respective decisions on the motion. Because it is unlikely that the parties at this point will agree on a briefing schedule and length of briefs, the best strategy may simply be to move to consolidate the four petitions and represent to the court that the parties have not yet reached agreement on a proposed briefing schedule, etc.

Thoughts?

Sent from Surface

From: 'daniel.dertke@usdoj.gov'

Sent: Tuesday, December 2, 2014 10:50 AM

To: Ryan Smith, 'mgodfrey@akingump.com', 'Flynn, Aaron M.', Don Pongrace, Wehrum, William L., Ramaley Karilee S, 'pspruhan@nndoj.org', Fichthorn, Norm

When I asked petitioners about this a few weeks ago, they were noncommittal and wanted to work out a briefing format first. My sense is that the Hopi Tribe will not oppose consolidation, so long as they get a separate brief of approximately full length, which is consistent with what I have proposed. NPCA and/or the TNA folks might oppose if they think that consolidation will either result in fewer words for them, or a more drawn out schedule than they would prefer.

From: Smith, Ryan A. [mailto:RSmith@BHFS.com]

Sent: Monday, December 01, 2014 6:10 PM

To: 'Godfrey, Merrill C.'; 'Flynn, Aaron M.'; Pongrace, Don; 'Wehrum, William L.'; 'Ramaley Karilee S'; 'Paul Spruhan'; 'Fichthorn, Norm'; Dertke, Daniel (ENRD)

Subject: RE: Motion to Consolidate-NGS

Great, thanks.

EPA and all the intervenors have agreed to join in the motion.

Dan, do you have a sense whether any of the petitioners will oppose consolidation at this point?

Ryan

From: Godfrey, Merrill C. [mailto:MGodfrey@AKINGUMP.com]

Sent: Monday, December 01, 2014 6:07 PM

To: Smith, Ryan A.; 'Flynn, Aaron M.'; Pongrace, Don; 'Wehrum, William L.'; 'Ramaley Karilee S'; 'Paul Spruhan'; 'Fichthorn, Norm'; daniel.dertke@usdoj.gov

Subject: RE: Motion to Consolidate-NGS

Gila River Indian Community will join.

From: Smith, Ryan A. [<mailto:RSmith@BHFS.com>]

Sent: Tuesday, November 25, 2014 2:50 PM

To: 'Flynn, Aaron M.'; Pongrace, Don; 'Wehrum, William L.'; 'Ramaley Karilee S'; 'Paul Spruhan'; 'Fichthorn, Norm'; Godfrey, Merrill C.; daniel.dertke@usdoj.gov

Subject: Motion to Consolidate-NGS

All,

Aaron and I spoke this afternoon regarding the procedural posture of the four petitions. In light of the court's confusion concerning the four motions to intervene (as evidenced by its November 17th order) and the fact that the final rule at issue in all four petitions is identical, we thought it would make sense to jointly move to consolidate the petitions.

Therefore, please let me know if you would join in a motion to consolidate, which I intend to prepare shortly. I should have a draft to the group sometime early next week.

Dan, please also let us know whether DOJ/EPA would join in the motion.

Thanks and have a happy Thanksgiving.

Best,

Ryan

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